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ISMAIL ABD HAMID

v.

KETUA POLIS DAERAH TIMUR LAUT PULAU PINANG & ORS

B

COURT OF APPEAL, PUTRAJAYA
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
C [CIVIL APPEAL NO: P-01-206-2010]
28 MARCH 2012

ADMINISTRATIVE LAW: *Judicial review - Application for - Dismissal of police officer - Disciplinary proceedings - Whether Public*
D *Officers (Conduct and Discipline) Regulations 1993 applicable to junior police officers - Whether junior police officers must be charged in accordance with offence prescribed in Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 - Whether charge illegal and unlawful - Whether there were sufficient grounds to*
E *allow judicial review - Whether High Court erred in dismissing application*

ADMINISTRATIVE LAW: *Public servants - Dismissal of junior police officer - Disciplinary proceedings - Whether Public Officers (Conduct and*
F *Discipline) Regulations 1993 applicable to junior police officers - Whether junior police officers must be charged in accordance with offence prescribed in Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 - Whether charge framed illegal and unlawful - Whether appellant's dismissal void and of no effect*

G The appellant was a corporal in the police force. *Via* a letter dated 31 January 2000, he was notified that a disciplinary proceeding was to be taken against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the Regulations 1970') on a disciplinary charge. However,
H the charge against the appellant was made under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). The appellant was found guilty of the charge and was dismissed. The appellant proceeded to file an application for judicial review for a declaration that his dismissal from the police
I force was unlawful on the ground that the charge against him was null, void and of no effect as it was framed outside the 1970 Regulations; and therefore it was illegal to conduct and proceed

with the disciplinary proceedings against him upon the said charge. The High Court dismissed the appellant's application. The appellant thus appealed before this court. It was the appellant's contention that the 1993 Regulations were applicable to senior police officers, but not to the appellant, a corporal, who was governed by the 1970 Regulations. As such, the appellant claimed that the charge preferred against him under the 1993 Regulations was illegal and unlawful.

Held (allowing the appeal)
Per Ramly Ali JCA delivering the judgment of the court:

(1) The appellant, being a corporal in the police force, came under the category of junior police officer. Regulation 1(2)(a) of the 1970 Regulations clearly provides that "these Regulations shall apply throughout Malaysia and to (a) all junior police officers and constables recruited in the States of Malaya". Therefore, the 1993 Regulations was not applicable to junior police officers and thus not applicable to the appellant. All junior police officers and constable (including the appellant) must be charged in accordance with the offence prescribed in the Schedule to the 1970 Regulations and shall be liable to punishment specified in the same Schedule, not any other regulations. (para 8)

(2) The offence provisions specified under reg. 7 of the 1993 Regulations (under which the appellant was charged) provide that an officer shall not use or consume (except for his medical purposes as prescribed by a medical practitioner who is registered under the Medical Act 1971) or abuse or be addicted to any dangerous drug; and for the purpose of the regulation, "dangerous drug" means any drug or substance listed in the First Schedule to the Dangerous Drugs Act 1952. Whilst item 8 of the Schedule to the 1970 Regulations is related to an offence of "while on or off duty renders himself unfit for duty through over indulgence in intoxicating liquor or narcotics." The two offences under the two said Regulations are different in nature, involving different ingredients to be proved against the offender. (paras 11 & 12)

(3) The charge framed against the appellant herein was illegal and unlawful. It was related to no offence as far as the appellant, as a junior police officer, was concerned. If at all the appellant needed to be charged, the charge should be under the 1970

A Regulations, but not under the 1993 Regulations. Consequently, the appellant's dismissal in the present case was unlawful, void and of no effect. (para 13)

(4) The provisions of the 1993 Regulations could not apply in the B 1970 Regulations on the ground that importing those provisions in the 1993 Regulations into the 1970 Regulations would amount to adding words and violating the 1970 Regulations (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah*). A charge under the 1993 C Regulations could not be imposed in the 1970 Regulations as the Schedule to the 1970 Regulations had already been made in the 1970 Regulations and reg. 3 thereof was clear in that "a charge shall be framed in accordance with the offence as prescribed in the Schedule." Thus, the High Court Judge had D erred in dismissing the appellant's application for judicial review. There were sufficient grounds to allow judicial review as applied for by the appellant. (paras 15 & 16)

Bahasa Malaysia *Translation Of Headnotes*

E Perayu merupakan seorang koperal dalam pasukan polis. Melalui surat bertarikh 31 Januari 2000, perayu telah diberikan notis bahawa satu prosiding tatatertib telah diambil terhadapnya di bawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 ('Peraturan F 1970') atas pertuduhan tatatertib. Walau bagaimanapun, pertuduhan terhadap perayu telah dibuat di bawah Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993'). Perayu didapati bersalah atas pertuduhan tersebut dan telah dipecat. Perayu memfailkan permohonan semakan kehakiman untuk G pengisytiharan bahawa pemecatannya daripada pasukan polis menyalahi undang-undang atas alasan bahawa pertuduhan terhadapnya adalah batal, tidak sah dan tidak mempunyai kesan kerana telah dirangkakan di luar Peraturan 1970; oleh itu adalah menyalahi undang-undang untuk menjalankan dan meneruskan H dengan prosiding tatatertib terhadapnya atas pertuduhan tersebut. Mahkamah Tinggi menolak permohonan perayu. Perayu, oleh itu membuat rayuan ke mahkamah ini. Adalah menjadi hujahan perayu bahawa Peraturan 1993 terguna pakai bagi pegawai polis kanan, tetapi bukan perayu, seorang koperal, yang ditadbir oleh Peraturan I 1970. Oleh itu, perayu memohon bahawa pertuduhan terhadapnya di bawah Peraturan 1993 adalah haram dan menyalahi undang-undang.

Diputuskan (membenarkan rayuan)
Oleh Ramly Ali HMR menyampaikan penghakiman mahkamah:

(1) Perayu, sebagai seorang koperal dalam pasukan polis, termasuk dalam kategori pegawai polis rendah. Peraturan 1(2)(a) Peraturan 1970 dengan jelas menyatakan bahawa "Peraturan-Peraturan ini boleh diguna pakai di seluruh Malaysia dan kepada (a) semua pegawai polis rendah dan konstabel yang diambil dari semua Negeri-Negeri Tanah Melayu". Oleh itu, Peraturan 1993 tidak terguna pakai kepada pegawai polis rendah dan dengan itu tidak boleh diguna pakai kepada perayu. Semua pegawai polis rendah dan konstabel (termasuk perayu) harus dituduh mengikut kesalahan yang telah ditetapkan dalam Jadual kepada Peraturan 1970 dan boleh dikenakan hukuman seperti yang dinyatakan dalam Jadual yang sama, dan bukan apa-apa peraturan yang lain.

(2) Peruntukan-peruntukan kesalahan yang dinyatakan di bawah per. 7 Peraturan 1993 (yang mana perayu didakwa di bawahnya) menyatakan bahawa seorang pegawai tidak boleh menggunakan atau mengambil (kecuali untuk tujuan perubatan seperti yang ditetapkan oleh seorang pengamal perubatan yang didaftarkan di bawah Akta Perubatan 1971) atau menyalahgunakan atau ketagih pada mana-mana jenis dadah berbahaya; dan untuk tujuan peraturan "dadah berbahaya" bermakna apa-apa jenis dadah atau bahan yang disenaraikan dalam Jadual Pertama kepada Akta Dadah Berbahaya 1952. Sementara itu item 8 Jadual kepada Peraturan 1970 adalah berhubung dengan kesalahan "semasa berada di dalam atau luar tugas menjadikan dirinya tidak layak untuk bertugas kerana telah mabuk keterlaluan dengan minuman keras dan dadah." Kedua-dua kesalahan di bawah Peraturan tersebut adalah berbeza, melibatkan bahan-bahan yang berbeza untuk dibuktikan terhadap pesalah.

(3) Pertuduhan yang dirangkakan terhadap perayu adalah haram dan menyalahi undang-undang. Ia tiada kaitan dengan apa-apa kesalahan berkenaan dengan perayu sebagai pegawai polis rendah. Jika perayu perlu dituduh, pertuduhan harus dibuat di bawah Peraturan 1970, tetapi bukan di bawah Peraturan 1993. Akibatnya, pemecatan perayu dalam kes ini adalah menyalahi undang-undang, terbatal dan tiada kesan.

(4) Peruntukan Peraturan 1993 tidak boleh diguna pakai pada Peraturan 1970 atas alasan bahawa mengimport masuk peruntukan-peruntukan Peraturan 1993 ke dalam Peraturan 1970 akan terjumlah kepada penambahan perkataan dan pelanggaran Peraturan 1970 (*Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah*). Satu pertuduhan di bawah Peraturan 1993 tidak boleh dikenakan ke atas Peraturan 1970 kerana Jadual kepada Peraturan 1970 telah dibuat di dalam Peraturan 1970 dan per. 3 adalah jelas bahawa "pertuduhan harus dirangkakan mengikut kesalahan yang telah ditetapkan di dalam Jadual". Oleh itu, Hakim Mahkamah Tinggi telah khilaf apabila menolak permohonan semakan kehakiman perayu. Terdapat beberapa alasan yang memadai untuk membenarkan semakan kehakiman seperti yang dipohon oleh perayu.

Case(s) referred to:

Council of Service Unions & Ors v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah [2004] 2 CLJ 777 FC ***(refd)***

Legislation referred to:

Federal Constitution, art. 132

Police Act 1967, s. 96(1), (2)

Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, regs. 1(2)(a), (2), 3(1)

Public Officers (Conduct and Discipline) Regulations 1993, reg. 7

For the appellant - M Athimulan (Norrizan Ahmad with him); M/s Athimulan & Co

For the respondent - Effendi Nazila Abdullah; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali JCA:

[1] The appellant was a corporal in the police force until he was dismissed on 24 February 2000. By a letter dated 31 January 2000 he was notified that a disciplinary proceeding was to be taken against him under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ('the

1970 Regulations') on a disciplinary charge. However, the charge against the appellant was made under the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). A

[2] On 24 February 2000 an orderly room proceeding was held and the appellant was found guilty of the charge. He was dismissed on the same day. B

[3] The appellant filed an application for judicial review for a declaration that his dismissal from the police force was unlawful on the ground that the charge against him was null, void and of no effect as it was framed outside the 1970 Regulations; and therefore it was illegal to conduct and proceed with the disciplinary proceedings against him upon the said charge. C

[4] The High Court, on 24 February 2010 dismissed the appellant's application. The appellant then filed the present appeal before this court against the said dismissal of his application. D

[5] The disciplinary proceedings against the appellant started with the formal notification "Pemberitahu Pertuduhan Tatatertib" dated 31 January 2000 issued by the "Pegawai Pengadil" to the appellant to the effect *inter alia* that "untuk mengambil tindakan tatatertib terhadap anda di bawah Peraturan-Peraturan Polis (Kelakuan dan Tatatertib) (Pegawai-Pegawai Rendah Polis dan Mata-Mata) 1970 - P.U.(A) 86 bertarikh 28 February 1970 dan P.U.(A) Pindaan 56 bertarikh 23 February 1984 di atas pertuduhan tatatertib." E F

[6] The charge against the appellant was framed under the 1993 Regulations (not under the 1970 Regulations) as follows:

> Bahawa kamu Koperal 57561 Ismail bin Abd Hamid, ketika itu bertugas di Balai Polis Dato Kramat, di dalam Daerah Timur Laut, di dalam Kontinjen Negeri Pulau Pinang, telah didapati ingkar perintah kepada kehendak Peraturan 7 Peraturan-peraturan Pegawai Awam 1993 iaitu dengan menyalahgunakan atau menagih dadah berbahaya di mana contoh air kencing diambil pada 9 Ogos 1999 disahkan "Positif Cannabinoids" oleh Ahli Kimiahayat, Jabatan Patologi, Hospital Pulau Pinang maka dengan yang demikian kamu telah melanggar tata kelakuan di bawah Peraturan 4(2)(i) Peraturan-peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993. G H I

[7] The appellant contended that the 1993 Regulations (under which the charge was framed against him) were applicable to senior police officers, but not to the appellant who was a corporal (a junior police officer), who was governed by the 1970 Regulations. As such the appellant claimed that the charge against him under the 1993 Regulations was therefore illegal and unlawful.

[8] It is not in dispute that the appellant being a corporal in the police force came under the category of junior police officers. Regulation 1(2)(a) of the 1970 Regulations clearly provides that "these Regulations shall apply throughout Malaysia and to (a) all junior police officers and constables recruited in the States of Malaya." Therefore, it can safely be concluded that the 1993 Regulations are not applicable to junior police officers and therefore not applicable to the appellant.

[9] The 1970 Regulations are specific regulations applicable to "all junior police officers and constables recruited in the State of Malaya", in relation to disciplinary proceedings. Regulation 3(1) of the 1970 Regulations clearly provides that "a charge shall be framed in accordance with the offence as prescribed in the Schedule; and the charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged." Regulation 2 of the same Regulations further provides that any officer who is found guilty of a disciplinary offence as specified in the Schedule hereto shall be liable to any punishment as specified in that Schedule.

[10] The above provisions clearly indicate the intention that all junior police officers and constable (including the appellant) must be charged in accordance with the offence prescribed in the Schedule to the 1970 Regulations and shall be liable to punishment specified in the same Schedule, not any other regulations.

[11] The offence charged against the appellant in the present case, as clearly stated in the charge itself, under reg. 7 of the 1993 Regulations relates to the offence of "ingkar perintah kepada kehendak Peraturan 7 Peraturan-Peraturan Pegawai Awam 1993 iaitu dengan menyalahgunakan atau menagih dadah berbahaya." While the related offence under item 8, of the Schedule to the 1970 Regulations relates to an offence of "while on or off duty renders himself unfit for duty through over indulgence in

intoxicating liquor or narcotics." The two offences under the two Regulations are different in nature, involving different ingredients to be proved against the offender. The 1970 Regulations were made under s. 96(1) and (2) of the Police Act 1967; whilst the 1993 Regulations were made under art. 132 of the Federal Constitution.

[12] The offence provisions specified under reg. 7 of the 1993 Regulations (under which the appellant was charged) provide that an officer shall not use or consume (except for his medical purposes as prescribed by a medical practitioner who is registered under the Medical Act 1971) or abuse or be addicted to any dangerous drug; and for the purpose of the regulation, "dangerous drug" means any drug or substance listed in the First Schedule to the Dangerous Drugs Act 1952. Whilst item 8 of the Schedule to the 1970 Regulations states: "Any junior police officer or constable who (8) while on or off duty renders himself unfit for duty through over indulgence in intoxicating liquor or narcotics ... shall be guilty of an offence against discipline and shall be liable to any of the following punishments ..."

[13] On that basis, we are of the view that the charge framed against the appellant in the present case is illegal and unlawful. It relates to no offence as far as the appellant, as a junior police officer, is concerned. If at all the appellant needs to be charged, the charge should be under the 1970 Regulations, but not under the 1993 Regulations. Consequently, the appellant's dismissal in the present case is unlawful, void and of no effect.

[14] In the case of *Council of Service Unions & Ors v. Minister for the Civil Service* [1985] AC 374 it was clearly held that "illegality" can be a ground for judicial review. The adjudicating authority in the present case must understand directly the law that regulates his decision making power and must give effect to it.

[15] The provisions of the 1993 Regulations cannot apply in the 1970 Regulations on the ground that importing those provisions in the 1993 Regulations into the 1970 Regulations would amount to adding words and violating the 1970 Regulations. This principle was stressed by the Federal Court in the case of *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v. Mohd Noor Abdullah* [2004] 2 CLJ 777. A charge under the 1993 Regulations

A cannot be imposed in the 1970 Regulations as the Schedule to the 1970 Regulations has already been made in the 1970 Regulations and reg. 3 thereof is clear in that "a charge shall be framed in accordance with the offence as prescribed in the Schedule".

B

[16] On this ground alone, we are satisfied that the learned High Court Judge had erred in dismissing the appellant's application for judicial review. We are also satisfied that on the facts of the present case, there are sufficient grounds to allow judicial review
C as applied for by the appellant. On this ground alone, the appeal before us can and should be allowed.

Conclusion

[17] On the above considerations, we therefore allow the appeal
D with costs of RM5,000 to the appellant. We also make an order that the deposit be refunded to the appellant.

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